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No. 84-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LEE M. THOMAS, ACTING ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Appellant,

v.

UNION CARBIDE AGRICULTURAL PRODUCTS
COMPANY, INC., *et al.*,
Appellees.

On Appeal From The United States District Court For The Southern District of New York

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BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

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January 10, 1985

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BRIEF FOR PPG INDUSTRIES, INC. AS AMICUS CURIAE

PPG Industries, Inc. ("PPG") submits this brief *amicus curiae*, having obtained written consent from both parties. PPG maintains that unless *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984) is overruled, this case is not ripe. Moreover, PPG's challenge to an arbitration award, pending in the United States District Court for the District of Columbia since July 7, 1983, is the forum in which the constitutional issues should be decided. Should the Court reach the substantive issues, however, it is PPG's position that, properly interpreted, the compulsory arbitration provision of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136a(c)(1)(D)(ii) (1983), is constitutional.

INTEREST AND POSITION OF THE AMICUS

PPG is the unnamed party to this case. Appellees argue that the constitutional questions decided in the court below are ripe because appellee Stauffer Chemical Company ("Stauffer") has participated in a mandatory arbitration proceeding, as required by *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2882 (1984). Motion to Affirm at 14, *Ruckelshaus v. Union Carbide Agricultural Products Co.*, No. 84-497 (U.S. filed Sept. 6, 1984).[1] PPG was the other participant in that arbitration, which produced the first and only arbitration award under FIFRA. PPG has challenged the validity of the award rendered in that proceeding in United States District Court, for the reasons discussed below. In these circumstances, PPG brings to this case a perspective not offered either by the appellees or the Government.

PPG manufactures and sells the pesticide product known generically as butylate, pursuant to a valid registration obtained from the Environmental Protection Agency ("EPA" or "the Agency"). Butylate was developed, patented, and originally registered under FIFRA by appellee Stauffer. In 1981, five years after Stauffer's butylate patents had expired, PPG applied for and obtained registration from EPA. Under EPA regulations in effect at that time, PPG was required to rely on test data previously submitted by Stauffer and to offer to compensate Stauffer. The parties were unable to agree on an amount of compensation and soon thereafter Stauffer unilaterally initiated mandatory arbitration.

[1] References to the Motion to Affirm are hereinafter cited as "M.A." References to the Government's Jurisdictional Statement are cited as "J.S."

On June 28, 1983, a panel of three arbitrators awarded Stauffer an amount of compensation at least six times greater than the cost of the data relied upon.[2] On July 7, 1983, PPG filed an action in the United States District Court for the District of Columbia challenging the award on the grounds that FIFRA is unconstitutional, unless interpreted to provide a standard of compensation and judicial review adequate to ensure that FIFRA arbitrators abide by that standard. *PPG Industries, Inc. v. Stauffer Chemical Co.*, No. 83-1941 (D.D.C. filed July 7, 1983). Stauffer counterclaimed for enforcement of the award and alternatively cross-claimed against EPA for a declaration that FIFRA violates Article III, and counterclaimed against PPG for damages from its use of Stauffer's data.

SUMMARY OF ARGUMENT

This case is not ripe because the court below disregarded the requirements of *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), and addressed the constitutional challenge to the FIFRA compensation system in the abstract, rather than on review of an actual arbitration. Appellees would have the Court overrule *Monsanto* and consider the Article III questions. The size and complexity of the record compiled in the PPG/Stauffer arbitration,

[2] The arbitrators awarded compensation to Stauffer of a lump sum constituting fifty percent of Stauffer's test costs, plus a post-patent running royalty of fifteen cents on every pound of butylate sold by PPG from 1983 through 1992 (subject to certain adjustments). The arbitrators awarded the royalty to compensate Stauffer for the "value" received by PPG from its reliance on Stauffer's data. The effect of the running royalty is to inflate the compensation award from approximately $1.4 million (fifty percent of Stauffer's data costs, as calculated by the arbitrators) to almost $17 million, to be paid over a ten-year period.

however, confirm this Court's judgment in *Monsanto* that challenge to the arbitration system should be considered in the context of an actual arbitration, so as to foster the presentation of concrete constitutional issues.

Should the Court reach the constitutional issues, PPG demonstrates that when properly interpreted, FIFRA's compulsory arbitration system is constitutional. In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), this Court recognized a narrow exception to the constitutional requirement that the federal judicial function be performed only by Article III courts. That exception permits non-Article III decision-makers, such as administrative agencies, masters, and arbitrators, to adjudicate federally created rights, but only if their fact-finding authority is limited by clearly defined congressional standards and their conclusions of law are subject to adequate judicial review. We submit that FIFRA's compulsory arbitration provision satisfies those standards.

When interpreted in light of its congressional purposes, the compulsory arbitration provision in FIFRA defines a narrow, fact-finding role for arbitrators to resolve compensation disputes. Congress limited FIFRA arbitrators' authority to the determination of the direct costs incurred by the original registrant in developing the test data relied upon by the subsequent registrant, and the apportionment of those costs fairly, equitably, and reasonably. Arbitrators who go beyond this limited statutory function run afoul of the substantive standard established by the Act.

Congress designed the follow-on registration procedures in Section 3(c)(1)(D) of FIFRA to avoid wasteful, duplicative testing by industry and review of such tests

by EPA, to reduce the costs of and minimize delays in registration, and to enhance competition in the pesticide industry. Congress did not intend the statute to provide economic windfalls to original registrants, create barriers to market entry, or extend the duration of patent grants. Accordingly, FIFRA compensation awards must be limited to a fair share of the costs incurred by the initial pesticide registrant in developing the relevant test data required by EPA. FIFRA does not contemplate or authorize a wide-open limitless inquiry into other factors, such as the economic "value" or "benefit" to a follow-on registrant in relying on the data filed by the original registrant.

The judicial review provision in Section 3(c)(1)(D)(ii) authorizes federal district courts to determine whether FIFRA arbitrators abide by the congressionally mandated standard of compensation. Arbitrators who exceed their authority by basing awards on factors not permitted by the Act have committed "misconduct" within the meaning of FIFRA. Accordingly, FIFRA's judicial review provision satisfies the constitutional requirements enunciated in *Northern Pipeline, supra.*

ARGUMENT

I. THIS CASE IS NOT RIPE.

In *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2882 (1984), this Court refused to hear Monsanto's Article III challenge to FIFRA's compulsory arbitration system because it was not ripe: "Only after EPA has considered data submitted by Monsanto in evaluating another application and an arbitrator has made an award will Monsanto's claims with respect to the constitutionality of the arbitration scheme become ripe." The Court then

remanded *this* case for reconsideration in light of *Monsanto. Ruckelshaus v. Union Carbide Agricultural Products Co.*, 104 S. Ct. 3566 (1984).

Appellees in this case argue that, because one of their number—Stauffer—has been through an arbitration, the *Monsanto* ripeness test has been met, even though this case was filed well before Stauffer initiated arbitration and does not arise out of an appeal of that arbitration.[3] Yet the clear import of the Court's ruling in *Monsanto* is that the constitutional challenge must arise in the context of an actual arbitration. Indeed, at the time this Court decided *Monsanto*, it was made aware Stauffer had participated in an arbitration, Brief for PPG Industries, Inc. as Amicus Curiae at 2, *Monsanto*, 104 S. Ct. 2862 (1984), and had the opportunity to hear this case. The Court decided instead to vacate *Union Carbide*. The case has now returned in the same posture. *Nothing has changed*. Accordingly, to decide the constitutional issues now, the Court would have to overrule its previous ripeness ruling.

The Court was correct when it declined to hear this case earlier, and, it should not retreat from that position now. The records compiled in the PPG/Stauffer arbitration and the now-pending review proceeding in district court demonstrate conclusively that consideration of the Article III issues in the context of an actual arbitration

[3] Appellees filed this case in 1976. J.S. at 4. PPG applied for its butylate registrations in 1981, offering to compensate Stauffer for EPA's reliance on Stauffer data. In 1982, Stauffer initiated arbitration. It was not until after this Court's June 26, 1984 decision in *Monsanto* and subsequent remand of this case, however, that appellees amended their complaint and alleged Stauffer's participation in an arbitration. J.S. at 7.

would foster the presentation of concrete constitutional questions. Because PPG was not a party in the court below, that court did not hear all of the considerations relevant to FIFRA's constitutionality.

The district court considering PPG's complaint benefits from the presence of all the adverse parties, and has before it a 67-page memorandum in support of PPG's motion for summary judgment, accompanied by a voluminous appendix containing the text of the arbitration award, pertinent passages from the arbitration transcript, and excerpts from the parties' arbitration briefs. PPG's motion for summary judgment addresses such issues as whether the arbitrators committed "misconduct" by awarding compensation for data submitted before 1970 in disregard of the statutory prohibition. Moreover, PPG has raised issues concerning whether Stauffer engaged in fraud in the arbitration by presenting evidence that overstated its profits. This Court has had no opportunity to consider the impact of these specific issues on the broader constitutional questions. The Court should not reach out to decide important constitutional questions out of context, without the benefit of a complete record and uninformed on the positions of all parties to an actual arbitration.

Should the Court decide, notwithstanding *Monsanto*, that the constitutional issues are ripe, PPG presents below—as it did in *Monsanto*—its position on the constitutionality of the arbitration provision. We demonstrate that the FIFRA arbitration system is constitutional only if the statute embodies legislative standards defining the arbitrators' discretion, and authorizes judicial review necessary to assure compliance with those standards. We demonstrate further that the Act interpreted in light of its legislative history fully satisfies the requirements of Article III.

II. THE FIFRA ARBITRATION SYSTEM IS CONSTITUTIONAL ONLY IF CONGRESS PROVIDED STANDARDS FOR COMPENSATION AWARDS AND JUDICIAL REVIEW TO ENFORCE THOSE STANDARDS.

Article III, Section 1 of the Constitution requires that the judicial power of the United States be exercised by judges who are protected by life tenure and nondiminishable compensation. FIFRA arbitrators, who are appointed on an *ad hoc* basis and whose salaries are set by agreement of the parties, indisputably do not satisfy these criteria. This Court has recognized, however, that Congress has discretion to prescribe the manner in which federal statutory rights are adjudicated. *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 80-81 (1982) (plurality). Thus, Congress may constitutionally assign fact-finding authority to a specialized "adjunct," so long as the adjunct's authority is "limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court." *Id.* at 81 (citation omitted).

Two critical factors emerge from Supreme Court precedent for determining whether a particular delegation of federal judicial power to non-Article III decisionmakers meets the requirements of the adjunct exception. First, the adjunct's role must be narrowly limited to factual adjudication. In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court upheld a statutory system that authorized an administrative agency to make initial factual determinations concerning compensation owed by employers for work-related injuries occurring upon the navigable waters of the United States. The statute authorized compensation "irrespective of fault" and prescribed a fixed and mandatory compensation schedule.

Id. at 38. The adjunct's only role was to determine "questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made. . . ." *Id.* at 54. As this Court stated in *Northern Pipeline*, "the agency in *Crowell* made only specialized, narrowly confined factual determinations regarding a particularized area of law." 458 U.S. at 85.

The second critical factor in assessing the constitutionality of statutes that provide for decisionmaking by an adjunct is the amount of review power retained by Article III courts. In *Crowell*, every compensation order was appealable to federal district court, "which had the sole power to enforce it or set it aside, depending upon whether the court determined it to be 'in accordance with law' and supported by evidence in the record." *Northern Pipeline*, 458 U.S. at 78 (quoting *Crowell*, 285 U.S. at 44-45). This ensured the constitutionality of the system: "the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases." *Crowell*, 285 U.S. at 54.

Thus, to be constitutional, the FIFRA arbitration system must reserve "the essential attributes" of judicial power to Article III courts. *Id.* at 51. Specifically, the arbitrators must be assigned "statutorily channelled factfinding functions," *Northern Pipeline*, 458 U.S. at 85, and "the ultimate decision [must be] made by the district court," *United States v. Raddatz*, 447 U.S. 667, 683 (1980).

Federal statutes come to the Court "with the presumption that the challenged statute is valid." *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764, 2780 (1983). Moreover, the Court should construe stat-

utes "whenever possible so as to uphold their constitutionality." *United States v. Vuitch*, 402 U.S. 62, 70 (1971). As demonstrated below, FIFRA can and should be interpreted so as to avoid the constitutional defects outlined above.

III. CONGRESS INTENDED THAT COMPENSATION BE LIMITED TO A SHARE OF THE DIRECT COSTS OF PRODUCING GOVERNMENTALLY REQUIRED TEST DATA.

A. FIFRA's Legislative History Demonstrates that Congress Mandated Compensation Based on Cost-Sharing.

FIFRA requires prospective pesticide sellers to register their products with EPA. Section 3(c)(1)(D) requires registration applicants to submit to EPA test data demonstrating the physical, biological, and chemical effects of their products. 7 U.S.C. § 136a(c)(1)(D). The Agency may grant registrations only to those products that will not cause "unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(D). FIFRA also permits other applicants to register a product identical or substantially similar to one previously registered by relying on data already in EPA's files, so long as they offer to compensate the original data submitter. *Id.* § 136a(c)(1)(D)(ii). Congress designed this "follow-on" registration procedure to promote competition in the pesticide industry by lowering entry barriers and to discourage economically wasteful, duplicative testing.[4]

[4] *See Mobay Chem. Corp. v. Costle*, 447 F. Supp. 811, 834 (W.D. Mo. 1978), *modified*, 517 F. Supp. 252 (W.D. Pa. 1981), *aff'd sub nom. Mobay Chem. Corp. v. Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 459 U.S. 988 (1982) ("FIFRA was not intended

(Footnote continued on next page)

While the statutory language does not impose an explicit standard of compensation, the compensation provision would be rendered superfluous if interpreted to authorize awards greater than the cost of the required test data. In that circumstance, all potential subsequent registrants that could afford to do so would simply duplicate the tests.[5] Those that could not afford the testing costs would be shut out of the business. In either case, the compensation provision would be an unused historical curiosity, and the dual congressional goals of promoting competition and avoiding duplicative testing would be frustrated.

(Footnote 4 continued)
to shelter pesticide registrants from the rigors of commercial competition"); *Mobay Chem. Corp. v. Costle*, 12 Env't Rep. Cas. (BNA) 1572, 1578 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam) (follow-on registrations designed to prevent "the necessity of costly duplicative testing in order to produce governmentally-mandated data without thereby casting the entire burden upon the party first to meet the government's requirements by producing and submitting that data"); S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4092 (duplicative testing "would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources.")

[5] From 1978 until 1983, encompassing the times at which PPG applied for its butylate registrations, EPA regulations effectively precluded the duplicative testing option. EPA adopted a "mandatory cite-all" policy which required all applicants to offer to compensate previous data submitters even if the applicant had submitted a full complement of its own data. *See* 49 Fed. Reg. 30884 (Aug. 1, 1984). Thus, an applicant could not avoid the obligation to compensate by relying exclusively on its own data. The awarding of compensation in amounts far in excess of data costs, such as the award in the PPG/Stauffer arbitration, is

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FIFRA's legislative history demonstrates unequivocally that Congress intended compensation awards to be limited to a share of required test costs. Prior to 1972, EPA (and its predecessor, the United States Department of Agriculture) routinely relied on relevant test data contained in its files to evaluate new applications for previously registered pesticides.[6] During that time, FIFRA did not require any compensation for such reliance.

In 1972, Congress substantially amended FIFRA, and greatly increased the amount and types of data that registration applicants were required to submit, by prohibiting EPA from registering a pesticide unless it had determined that the product would not cause unreasonable adverse effects on the environment. Congress recognized that if submitted data instantly became available for free use by subsequent applicants, the new data

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(Footnote 5 continued)
particularly unfair because PPG could not choose to avoid compensation.

In *National Agricultural Chems. Ass'n v. EPA*, 554 F. Supp. 1209 (D.D.C. 1983), the court held that the mandatory cite-all regulations exceeded EPA's authority and that future applicants could avoid the obligation to compensate previous data submitters by generating their own data. EPA has recently promulgated final rules to implement this option. 49 Fed. Reg. 30884 (Aug. 1, 1984). Thus, future applicants will have the choice of generating duplicative data to avoid excessive compensation awards.

[6] *Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862, 2877 (1984) ("there is some evidence that the practice of using data submitted by one company during consideration of the application of a subsequent applicant was widespread and well known"); S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 18-19, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4040-41 ("as a matter of practice," test data submitted by one registrant has "been considered by the Administrator to support the registration of the same or a similar product by another registrant").

requirements could act as a disincentive for research and development. In response to that perceived problem, large pesticide producers urged Congress to preclude reliance by subsequent registrants on data previously submitted by others to EPA.

Congress rejected these "exclusive use" proposals because such provisions would erect

> barriers to entry in the pesticides industry . . . which go far beyond that envisioned by our patent system. In effect, whether or not a pesticide has patent protection, a manufacturer wishing to register a pesticide previously registered would have to duplicate the required test data . . . . In the extreme, a monopoly in the production of a pesticide could ensue if competitors are unable to afford the sometimes costly safety and efficacy tests.

S. Rep. No. 970, 92d Cong., 2d Sess. 12, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4096. Moreover, the duplicative testing that would result from an exclusive use system would divert research and development funds that otherwise could be spent on new products. *Id.* Instead of exclusive use or the free use system then in effect, Congress proposed a "system under which permission to use the test data *in return for a reasonable share of the cost of producing the data* would be required." S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 69, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4089 (emphasis added). A statement designated by the Senate as "legislative intent" explained that "fairness and equity require *a sharing of the governmentally required cost of producing the test data* used in support of [the subsequent application]." *Id.* at 72-73, *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4092 (emphasis

added).[7] *See also id.* (duplicative testing "would represent a wasteful, time-consuming, and costly process resulting in a substantial misallocation of resources").

The 1972 FIFRA amendments ratified EPA's practice of relying on previously submitted data, but required subsequent applicants to offer to compensate data submitters. The statute also provided that data compensation disputes would be resolved by administrative hearings at EPA. Judicial review of compensation decisions was available in federal district court.[8] The statute thus embodied an unambiguous standard of compensation and opportunity for judicial review.

The compensation system enacted in 1972 did not specify whether data submitted to EPA prior to 1972 were compensable. In 1975, Congress resolved the uncertainty by amending FIFRA to provide that data submitted before January 1, 1970 were not subject to compensation. The 1975 FIFRA amendments also served to confirm the cost-sharing standard of compensation.

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[7] The compensation provision was not enacted in the precise form of the Senate bill. As enacted, the legislation substituted "reasonable compensation" for "reasonable share of the cost." Nevertheless, cost-sharing clearly was the intended standard. As held in the first and leading FIFRA compensation case, the change in language did not reflect a change in meaning. *Ciba-Geigy Corp. v. Farmland Indus., Inc.*, FIFRA COMP. Dkt. Nos. 33, 34 & 41, Initial Decision at 26-33 (Aug. 19, 1980), Final Order issued by the Judicial Officer (Apr. 30, 1981), Affirmed by the Administrator (July 28, 1981). *See also infra* at 18-19.

[8] The 1972 FIFRA authorized the data submitter, but not the subsequent registrant, to appeal a compensation determination, and precluded the reviewing court from reducing the amount of compensation awarded by EPA. Pub. L. No. 92-516, 86 Stat. 973 (1972). Although subject to constitutional attack, this one-sided review provision was never challenged.

In enacting the 1970 cutoff, Congress rejected the position of large pesticide manufacturers that all data, regardless of when submitted, should be compensable. In doing so, Congress confirmed that the "language" of compensation was cost-sharing: "[T]o require *cost-sharing* with respect to 'old data' . . . could create a windfall for producers of this data since such data was prepared without any reasonable expectation that the law would require *sharing of the costs* of production." S. Rep. No. 452, 94th Cong., 1st Sess. 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1367-68 (emphasis added). Congress thus also confirmed that the imposition of a compensation obligation on "old data" would have vitiated the congressional objectives underlying FIFRA by raising barriers to market entry, thereby neutralizing the procompetitive effects of compensation. Moreover, such a provision would not have created any incentive for future research and development since compensation for such data would merely reward past efforts.[9]

The Committee further explained that compensation was designed "to provide for *equitable sharing among industry members of the cost of producing data* necessary to obtain or continue a registration under the Act." *Id.* at 10, *reprinted in* 1975 U.S. Code Cong. & Ad. News at

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[9] By establishing a 1970 cutoff, rather than precluding compensation for data submitted prior to the effective date of the 1972 amendments, Congress did provide a limited windfall for data submitters. The 1970 date, however, emerged from the Conference Committee as a compromise between the differing versions of the two Houses. *See* H.R. Conf. Rep. No. 668, 94th Cong., 1st Sess. 5, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1380. The House of Representatives had proposed that all old data be compensable, H.R. Rep. No. 497, 94th Cong., 1st Sess. 25 (1975), while the Senate had proposed an October 21, 1972 cutoff, S. Rep. No. 452, 94th Cong., 1st Sess. 2, *reprinted in* 1975 U.S. Code Cong. & Ad. News 1359, 1360.

1367 (emphasis added). Finally, several members of the House Committee on Agriculture stated in supplemental views contained in the Committee Report:

> Reasonable compensation should be an equitable *sharing* of the direct costs of producing governmentally required test data. It should not be based upon a "value" basis. No profit should accrue to the original applicant . . . .

H.R. Rep. No. 497, 94th Cong., 1st Sess. 65 (1975) (emphasis in original).[10]

Congress amended FIFRA again in 1978 to restrict further the compensation obligation by providing that data are subject to compensation only for fifteen years after their submission to EPA. Congress also restated its intention that compensation be limited to cost-sharing.[11] The legislative history of the 1978 amendments states that the compensation provision recognizes "the cost of data development and the need for *cost sharing* among registrants." S. Rep. No. 334, 95th Cong., 1st Sess. 4

[10] The 1975 amendments also removed uncertainty over the constitutionality of the compensation provision by providing that both parties to a compensation dispute were entitled to judicial review, and authorizing the reviewing court to increase or decrease the compensation ordered by EPA.

[11] As a further incentive for research and development, Congress provided that data on *new products* submitted after September 30, 1978 (the effective date of the amendments) would be protected from use by subsequent registrants for ten years, subject to cost-sharing for a maximum of five years, and thereafter be available for free use. *See* 7 U.S.C. § 136a(c)(1)(D). In limiting this heightened level of protection to data on innovative products and for a term of ten years, Congress minimized the anticompetitive effects of the provision. Senator Leahy, a sponsor of the legislation, explained that the restrictions on

(Footnote continued on next page)

(1977) (emphasis added). The legislative history further explained:

> The amendments in S. 1678 recognize the proprietary interest in health and safety data on the part of pesticide registrants who underwrite the expense of obtaining such data. It eliminates the "free-rider" situation to which industry has objected, but *keys the amount of payment by subsequent registrants to the costs of developing data necessary for government approval, not the costs of developing the pesticide.* The amendments also avoid an extension of the patent rights on chemicals.

Id. at 31 (emphasis added).

FIFRA's legislative history thus establishes unequivocally that Congress intended compensation to be limited to a share of the direct cost of tests required for registration. Indeed, such an interpretation is the only one consistent with FIFRA's purposes. The cost-sharing standard facilitates the statutory goal of avoiding duplicative testing, promotes competition by lowering barriers to entry, and provides an incentive for research and development by allowing for partial reimbursement of data costs.

(Footnote 11 continued)
exclusive use "largely confined [such] coverage to chemicals that are patentable and for a term generally shorter than the patent life enjoyed by pesticides." 124 Cong. Rec. S15303 (daily ed. Sept. 18, 1978). Notably, Congress did not increase the protection for previously submitted data or future data on old products; since those products were already developed, there was no need for further incentives.

B. Administrative and Judicial Interpretations of FIFRA Confirm the Cost-Sharing Standard of Compensation.

Before Congress established mandatory arbitration as the means for resolving data compensation disputes, an EPA administrative law judge ("ALJ") was assigned that responsibility. The only two decisions rendered under that system awarded the data submitter a share of its data costs as compensation. Moreover, federal courts that have considered FIFRA's compensation provision in the course of reviewing other aspects of the statute's constitutionality have determined that compensation is limited to data costs. All of these decisions have a common characteristic: in each case, the decisionmaker undertook an analysis of the legislative history set forth above.

In both the compensation decisions rendered after an administrative hearing before EPA, the ALJ relied on FIFRA's legislative history and purposes to hold that Congress intended to require subsequent registrants to pay only a share of data costs. *Ciba-Geigy Corp. v. Farmland Industries, Inc.*, FIFRA COMP. Dkt. Nos. 33, 34 & 41, Initial Decision (Aug. 19, 1980), Final Order issued by the Judicial Officer (Apr. 30, 1981), Affirmed by the Administrator (July 28, 1981); *Union Carbide Agricultural Products Co. v. Thompson-Hayward Chemical Co.*, FIFRA COMP. Dkt. No. 27 (July 13, 1982). These rulings by EPA that the compensation provision embodies a cost-sharing standard should be treated with considerable deference by the Court. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2782 (1984) ("[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .").

In both cases, the ALJ categorically rejected awards proposed by the original data submitters that would have produced compensation payments in excess of data costs. Such results would have been contrary to the congressional purposes of avoiding duplicative testing and reducing barriers to market entry. A cost-sharing standard of compensation furthered those goals by recognizing the data submitter's interest in recovering its costs and "the equally important public interest of keeping costs of entry into the pesticide business attributable to government regulation as low as possible." *Farmland*, Initial Decision at 46. Moreover, given Congress' repeatedly expressed concern that duplicative testing was economically wasteful, it certainly intended compensation to "result in lower costs to subsequent registrants than if they had to duplicate the tests." *Thompson-Hayward*, Initial Decision at 21.

The original data submitters in the *Farmland* and *Thompson-Hayward* cases improperly attempted to use the statutory compensation requirement to reward research and development. The ALJ reasoned that Congress did not intend compensation to be used "to extend the rewards for . . . research and development . . . beyond the period allowed by the patent grant." *Farmland*, Initial Decision at 30. The ALJ succinctly summarized the underlying purpose and scope of compensation as follows:

> FIFRA, of course, added another dimension to the marketing of pesticides, namely the additional cost in getting a product to market that may be imposed by FIFRA's registration requirements. It seems

> clear from the legislative history that Congress felt as a matter of fairness, if for no other reason, that the first registrant should not be saddled with the entire burden of this additional cost. But it would appear that it was only with the incremental cost of obtaining a registration that Congress appears to have been concerned about, and the desirability of neutralizing any adverse effect on research and development which would be caused if the entire testing cost were imposed on the first registrant. Over and above this, the incentive for research and development, and a company's investment in it, would still have to come from the profits to be gained in the sale of the product and from whatever competitive advantage accrued to it from patents or secret processes.

Thompson-Hayward, Initial Decision at 21.

Several federal courts also found a cost-sharing compensation standard in the course of considering constitutional challenges to FIFRA. In *Chevron Chemical Co. v. Costle*, 641 F.2d 104 (3d Cir.), *cert. denied*, 452 U.S. 961 (1981), while ruling that FIFRA did not effect an unconstitutional taking of property, the court quoted FIFRA's legislative history in explaining its understanding of compensation:

> [I]t was decided that equity and fairness required a sharing of the governmentally required cost of producing the test data used in support of an application by an applicant other than the originator of such data.

641 F.2d at 109 (footnote omitted). *See also Amchem Products, Inc. v. GAF Corp.*, 594 F.2d 470, 481 (5th Cir.), *modified*, 602 F.2d 724 (5th Cir. 1979) ("[i]t was never the intent of Section 3(c)(1)(D) to provide more than an equitable sharing of research costs"); *Chevron Chemical Co. v. Costle*, 443 F. Supp. 1024, 1028 n.2 (N.D. Cal. 1978)

(purpose of data compensation was "saving the cost of duplicative testing").

In *Mobay Chemical Corp. v. Costle*, 12 Env't Rep. Cas. (BNA) 1572 (W.D. Mo. 1978), *appeal dismissed for want of jurisdiction*, 439 U.S. 320 (1979) (per curiam), a three-judge court rejected the contention that FIFRA violated the taking clause of the fifth amendment. In reaching that conclusion, the court reasoned that the compensation system provided limited protection to "the expenditure of the first applicant in generating the data." *Id.* at 1578. The court added that

> neither the legislative history nor the plain language of § 3 indicate[s] that in adopting its regulatory scheme Congress was concerned with ensuring maintenance of competitive commercial positions of the original submitters of data. Rather, the *Congressional concern in adopting the original § 3(c)(1)(D) in 1972 was for maximum allocation of resources in the public interest—preventing the necessity of costly duplicative testing* in order to produce governmentally-mandated data without thereby casting the entire burden upon the party first to meet the government requirements by producing or submitting that data.

Id. (citing S. Rep. No. 838 (Part II), 92d Cong., 2d Sess. 72-73, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3993, 4092) (emphasis added).

Finally, in another case entitled *Mobay Chemical Corp. v. Costle*, 447 F. Supp. 811 (W.D. Mo. 1978), *modified*, 517 F. Supp. 252 (W.D. Pa. 1981), *aff'd sub nom. Mobay Chemical Corp. v. Gorsuch*, 682 F.2d 419 (3d Cir.), *cert. denied*, 459 U.S. 988 (1982), the court rejected a broad-based attack on FIFRA and concluded that:

> FIFRA was not intended to shelter pesticide registrants from the rigors of commercial competition.

> The protection afforded by § 3(c)(1)(D) extends only to compensation for producing the test data used in the registration process, and not to the ultimate economic or commercial benefits which may flow from the registration itself.

447 F. Supp. at 834.

Two federal court decisions stand in stark contrast to the above cases, both in terms of their holdings that FIFRA is unconstitutional and their failure to find a standard of compensation. In *Monsanto Co. v. Acting Administrator EPA*, 564 F. Supp. 552, 567 (E.D. Mo. 1983), *vacated sub nom. Ruckelshaus v. Monsanto Co.*, 104 S. Ct. 2862 (1984), the court found "the absence of a formula of [*sic*] a guidance on the evaluation of data for compensation purposes." In the instant case, the court below concluded that FIFRA appeared to provide "a standardless delegation of powers." *Union Carbide Agricultural Products Co. v. Ruckelshaus*, 571 F. Supp. 117, 124 (S.D.N.Y. 1983), *vacated*, 104 S. Ct. 3566 (1984). Neither district court opinion evidences any examination of FIFRA's legislative history. Thus, it is not surprising that both courts failed to find a standard of compensation.

One last decision, the award in the PPG/Stauffer arbitration, also failed to find a cost-sharing standard of compensation. The arbitrators reached that result despite PPG's repeated citation of the legislative history discussed above. The award contains not a single sentence relating to a standard of compensation, nor any discussion of the legislative history. The award imposes on PPG a compensation obligation at least six times greater than the cost of the data. Such an award produces results totally at odds with Congress' purposes in enacting FIFRA.

IV. FIFRA SHOULD BE INTERPRETED TO PROVIDE JUDICIAL REVIEW OF ARBITRATION AWARDS.

The constitutionality of the FIFRA mandatory arbitration system depends in part on whether Congress provided sufficient opportunity for judicial review by Article III courts of compensation awards issued by nonjudicial arbitrators. *Northern Pipeline*, 458 U.S. at 81; *Raddatz*, 447 U.S. at 682. The FIFRA provisions delegating compensation determinations to arbitrators can be interpreted to meet constitutional standards. The judicial review provision in FIFRA, as well as federal courts' inherent authority to review arbitration awards, authorize Article III courts to assure that FIFRA arbitrators follow the congressional standard of compensation.

FIFRA provides that arbitration awards may be reviewed for "fraud, misrepresentation, or other misconduct by one of the parties to the arbitration or the arbitrator."[12] 7 U.S.C. § 136a(c)(1)(D)(ii). The arbitrators in the PPG/Stauffer proceeding correctly recognized that "'misconduct' on the part of arbitrators can include their acting in excess of their powers, or 'perversely misconstruing the law.'" Arbitration Award at 2 n.* (quoting *Amicizia Societa Navigazione v. Chilean Nitrate*

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[12] Congress' substitution in 1978 of private arbitration for EPA administrative hearings as the mechanism for determining arbitration enables EPA to focus limited resources on health and safety issues rather than resolution of private disputes. Senator Leahy, a sponsor of the 1978 amendments, explained that "[d]etermining the amount and terms of . . . compensation are matters that do not require active governmental involvement [;they] should be determined to the fullest extent practicable, within the private sector." 123 Cong. Rec. S13095 (daily ed. July 29, 1977).

Etc., 184 F. Supp. 116 (S.D.N.Y. 1959), *aff'd*, 274 F.2d 805 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960)). Thus, "misconduct" by arbitrators must include disregard of a congressional mandate that compensation be limited to cost-sharing, if such a standard is to have any substance.[13] Accordingly, FIFRA provides ample authority for Article III courts to review arbitration awards.

Moreover, there are no grounds for attributing to Congress the intent in FIFRA to abrogate the settled principles of judicial review of arbitration awards. As this Court has held, arbitration decisions are subject to judicial review to ensure that the arbitrators have not exceeded their lawful authority. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Arbitrators' powers are circumscribed by the source from which their authority is derived. *Monongahela Power Co. v. Local No. 2332*, 566 F.2d 1196, 1199 (4th Cir. 1976). Whether arbitrators have exceeded the scope of their authority "is an issue for judicial resolution." *Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Independent Truck Drivers Union*, 611 F.2d 580, 583 (5th Cir. 1980). When the court finds that arbitrators have exceeded their authority, their

[13] The provision of review for misconduct is consistent with the fact that arbitrators need not be trained decisionmakers or even lawyers. The delegation of authority to arbitrators facilitates the resolution of data compensation disputes by persons with expertise in the health and safety field. *See* H.R. Rep. No. 663, 95th Cong., 2d Sess. 43, *reprinted in* 1978 U.S. Code Cong. & Ad. News 1988, 2016 (FIFRA arbitrators "should be persons experienced in the pesticide field and, in particular, research and development of pesticides"). In these circumstances, it is all the more important that federal courts be in a position to review the arbitrators' decision to determine if they have acted "in excess of their powers."

awards "cannot be enforced." *United States Postal Service v. National Rural Letter Carriers Association*, 535 F. Supp. 1034, 1037 (N.D. Ohio 1982).

When arbitrators' authority derives from a contract between the parties, the resultant award is invalid and unenforceable if the arbitrators exceeded their powers under the contract. The award must be overturned unless it "draws its essence from the collective bargaining agreement." *Enterprise Wheel & Car Corp.*, 363 U.S. at 597. Courts will deny enforcement to and vacate awards that exceed the arbitrators' contractual authority. *Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.*, 607 F.2d 649, 651 (5th Cir. 1979); *Washington Hospital Center v. Service Employees International Union*, 112 L.R.R.M. (BNA) 3008 (D.D.C. 1983); *Zeigler Coal Co. v. District 12, United Mine Workers of America*, 484 F. Supp. 445, 447 (C.D. Ill. 1980); *International Brotherhood of Electrical Workers v. E.I. DuPont de Nemours & Co.*, 420 F. Supp. 208, 210 (E.D. Va. 1976).

FIFRA arbitrators' power derives not from a contract, but from a statute that imposes mandatory arbitration. Because of the due process implications of such a procedure,[14] Congress must have intended for federal courts

[14] The mandatory nature of the arbitration provision raises substantial due process problems. *See Charles Wolff Packing Co. v. Court of Indus. Relations*, 262 U.S. 522 (1923); *Midkiff v. Tom*, 471 F. Supp. 871, 883-84 (D. Hawaii 1979); *United Farm Workers v. Babbitt*, 449 F. Supp. 449, 466 (D. Ariz. 1978), *rev'd on other grounds*, 442 U.S. 289 (1979). Due process requires that the FIFRA arbitrators be limited to a carefully circumscribed fact-finding role, and not engage in the interpretation of a complex federal statute. *See Mount St. Mary's Hospital v. Catherwood*, 26 N.Y.2d 493, 311 N.Y.S.2d 863, 872 (Ct. App. 1970) (provision of mandatory "*ad hoc* arbitration tribunals to resolve disputes

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to review FIFRA compensation determinations carefully and vacate awards if the arbitrators exceed their statutory authority. So construed, FIFRA is constitutional.

CONCLUSION

For the reasons set forth above, PPG submits that FIFRA delegates to arbitrators a narrow fact-finding role, subject to judicial review. Thus, the mandatory arbitration provision is constitutional.

Respectfully submitted,

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(Footnote 14 continued)
without limitation to rules of law" is unconstitutional). Due process also requires that there be judicial review adequate to ensure that FIFRA arbitrators' factual findings are supported by evidence in the record and are not arbitrary or capricious. Such safeguards guarantee that the awards "imposed by the arbitrator under the power conferred by statute have a basis not only in his good faith, but in law and the record before him." *Id.* at 873 (citation omitted).